

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

FRED MEYER STORES, INC., a subsidiary of
THE KROGER COMPANY

and

Case 19-CA-272795

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL NO. 21, affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

QUALITY FOOD CENTERS, a subsidiary of
THE KROGER COMPANY

and

Case 19-CA-272796

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL NO. 21, affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

**ORDER CONSOLIDATING CASES, CONSOLIDATED
COMPLAINT AND NOTICE OF HEARING**

Pursuant to § 102.33 of the Rules and Regulations of the National Labor Relations Board (the “Board”), and to avoid unnecessary costs or delay, **IT IS ORDERED THAT** Case 19-CA-272795, which is based on a charge filed by United Food and Commercial Workers Local No. 21, affiliated with United Food and Commercial Workers International Union (the “Union”), against Fred Meyer Stores, Inc., a subsidiary of The Kroger Company (“Respondent Fred Meyer”), and Case 19-CA-272796, which is based on a charge filed by the Union against Quality Food Centers, a subsidiary of The Kroger Company (“Respondent QFC”), are consolidated.

This Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, which is based on these charges, is issued pursuant to § 10(b) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*, and § 102.15 of the Rules and Regulations of the National Labor Relations Board (the "Board"), and alleges that Respondent Fred Meyer and Respondent QFC (together, "Respondents") have violated the Act as described below.

1.

(a) The charge in Case 19-CA-272795 was filed by the Union on February 12, 2021, and a copy was served on Respondent Fred Meyer by U.S. mail on February 16, 2021.

(b) The charge in Case 19-CA-272796 was filed by the Union on February 12, 2021, and a copy was served on Respondent QFC by U.S. mail on February 16, 2021.

2.

(a) At all material times, Respondent Fred Meyer, a subsidiary of The Kroger Company, has been a State of Ohio corporation with offices and places of business throughout the State of Washington ("Fred Meyer stores"), and has been engaged in the retail grocery business.

(b) Respondent Fred Meyer, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$500,000.

(c) Respondent Fred Meyer, during the past twelve months, which period is representative of all material times, in conducting its business operations described

above in paragraph 2(a), purchased and received at Fred Meyer stores goods valued in excess of \$50,000 directly from points outside the State of Washington.

(d) Respondent Fred Meyer has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act.

3.

(a) At all material times, Respondent QFC, a subsidiary of Respondent Fred Meyer, which is itself a subsidiary of The Kroger Company, has had offices and places of business throughout the State of Washington ("QFC stores"), and has been engaged in the retail grocery business.

(b) Respondent QFC, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 3(a), derived gross revenues in excess of \$500,000.

(c) Respondent QFC, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 3(a), purchased and received at QFC stores goods valued in excess of \$50,000 directly from points outside the State of Washington.

(d) Respondent QFC has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act.

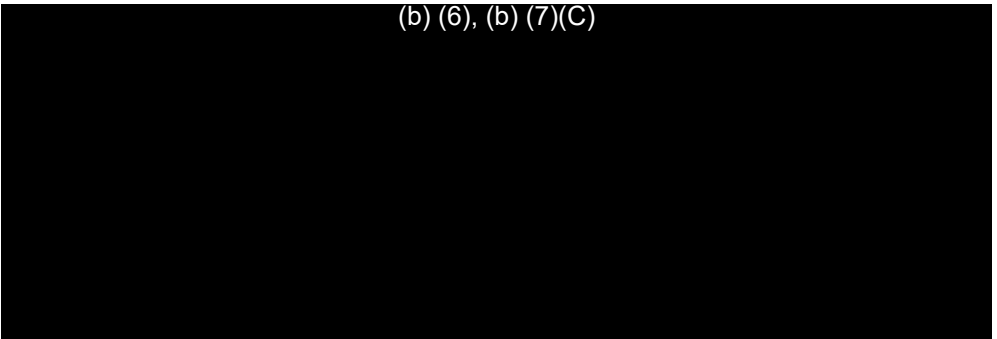
4.

At all material times, the Union has been a labor organization within the meaning of § 2(5) of the Act.

5.

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent Fred Meyer within the meaning of § 2(11) of the Act and/or agents of Respondent Fred Meyer within the meaning of § 2(13) of the Act:

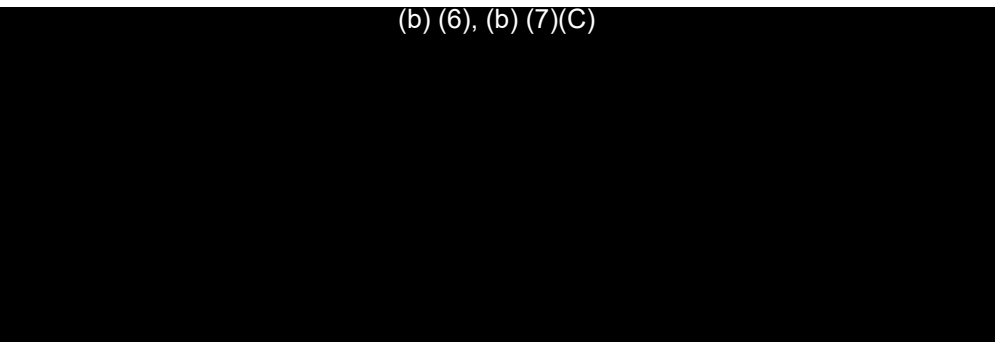
(b) (6), (b) (7)(C)



6.

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent QFC within the meaning of § 2(11) of the Act and/or agents of Respondent QFC within the meaning of § 2(13) of the Act:

(b) (6), (b) (7)(C)



7.

(a) As more specifically defined in the parties' various county-specific (or, in some cases, store-specific) collective bargaining agreements, certain grocery employees of Respondent Fred Meyer (the "Fred Meyer Grocery Unit"); certain meat

department employees of Respondent Fred Meyer (the “Fred Meyer Meat Unit”); certain general merchandising employees of Respondent Fred Meyer (the “Fred Meyer GM Unit”); and certain front-end central checkstand (“CCK”) employees of Respondent Fred Meyer (the “Fred Meyer CCK Unit”) (altogether, the “Fred Meyer Units”) constitute units appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act.

(b) At all material times since at least 2005, Respondent Fred Meyer has recognized the Union as the exclusive collective-bargaining representative of the Fred Meyer Units. This recognition has most recently been embodied in various county-specific (or, in some cases, store-specific) collective-bargaining agreements that are currently in effect.

(c) At all material times, based on § 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Fred Meyer Units.

8.

(a) As more specifically defined in the parties’ various county-specific (or, in some cases, store-specific) collective bargaining agreements, certain grocery employees of Respondent QFC (the “QFC Grocery Unit”) and certain meat department employees of Respondent QFC (the “QFC Meat Unit”) (together, the “QFC Units”) constitute units appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act.

(b) At all material times since at least 2005, Respondent QFC has recognized the Union as the exclusive collective-bargaining representative of the QFC Units. This

recognition has most recently been embodied in various county-specific (or, in some cases, store-specific) collective-bargaining agreements that are currently in effect.

(c) At all material times, based on § 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the QFC Units.

9.

(a) Prior to June 2020, Respondents maintained and enforced facially neutral dress code/apparel policies and had established past practices of allowing employees to wear a variety of non-work-related buttons and other personal apparel to work, without prior management authorization.

(b) Beginning in about June 2020, Respondents' employees working at Fred Meyer and QFC stores throughout the State of Washington engaged in concerted activities with other employees for the purpose of mutual aid and protection, concertedly protesting racism and racial discrimination in their workplaces by, *inter alia*, wearing personal apparel espousing the message "Black Lives Matter" or "BLM" at work in protest against racial discrimination in employment generally as well as over their specific store-related concerns, including their perception that Respondent Fred Meyer and/or Respondent QFC had failed to adequately respond and protect their employees after reports of racist treatment of employees by customers and coworkers.

(c) Beginning in about late June or early July 2020, and to date, Respondents:

i. enforced their existing, facially neutral dress code/apparel policies described above in paragraph 9(a) discriminatorily to prohibit employees from engaging

in protected, concerted activities, including the protected, concerted activities described above in paragraph 9(b); and/or

ii. implemented and began to enforce *new* dress code/apparel policies specifically prohibiting employees from wearing apparel espousing the message “Black Lives Matter” or “BLM” at work, in response to employees’ protected, concerted activities, including the protected, concerted activities described above in paragraph 9(b) – which policies Respondents have maintained and enforced to date.

(d) Beginning in about early August 2020, Respondents’ employees working at Fred Meyer and QFC stores throughout the State of Washington engaged in concerted activities with other employees for the purpose of mutual aid and protection, concertedly protesting racism and racial discrimination in their workplaces by, *inter alia*, wearing buttons or pins provided by the Union that read “Black Lives Matter – UFCW Local 21” at work in protest against racial discrimination in employment generally as well as over their specific store-related concerns, including their perception that Respondent Fred Meyer and/or Respondent QFC had failed to adequately respond and protect their employees after reports of racist treatment of employees by customers and coworkers.

(e) Beginning in about mid-August 2020, and to date, Respondents:

i. continued to enforce their facially neutral dress code/apparel policies described above in paragraph 9(a) discriminatorily to prohibit employees from engaging in protected, concerted activities, including the protected, concerted activities described above in paragraph 9(d); and/or

ii. extended and enforced their newly-implemented dress code/apparel policies described above in paragraph 9(c)(ii) to specifically prohibit employees from wearing BLM buttons or pins at work, in response to employees' protected, concerted activities, including the protected, concerted activities described above in paragraph 9(d) – which policies Respondents have maintained and enforced to date.

(f) Respondents engaged in the conduct described above in paragraphs 9(c) and (e) because Respondents' employees engaged in protected, concerted activities, including those described above in paragraphs 9(b) and (d), and/or to discourage employees from engaging in protected, concerted activities.

10.

(a) Throughout September and October 2020, and continuing to date, on specific dates better known to Respondents, Respondents instructed individual employees to cease engaging in protected, concerted activities, including wearing the BLM apparel and/or buttons described in paragraphs 9(b) and 9(d), and sent those employees who refused to cease engaging in such protected, concerted activities home from their shifts prematurely and without pay. The employees sent home without pay have included Fred Meyer employees (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C), among other employees better known to Respondents.

(b) Respondents engaged in the conduct described above in paragraph 10(a) because these employees engaged in protected, concerted activities, including those

described above in paragraphs 9(b) and (d), and/or to discourage employees from engaging in these or other protected, concerted activities.

11.

(a) The subjects described above in paragraphs 9(c) and (e) relate to the wages, hours, and other terms and conditions of employment of the Fred Meyer Units and the QFC Units and are mandatory subjects of collective bargaining.

(b) Respondents engaged in the conduct described above in paragraphs 9(c) and (e) without prior notice to the Union and without affording the Union an opportunity to bargain over these decisions and/or their effects.

12.

By the conduct described above in paragraphs 9 and 10, Respondents have been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

13.

By the conduct described above in paragraph 11, Respondents have been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of their Unit employees within the meaning of § 8(d) of the Act in violation of §§ 8(a)(1) and 8(a)(5) of the Act.

14.

The unfair labor practices of Respondents described above affect commerce within the meaning of §§ 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above, to the extent the Board finds that Respondents unlawfully implemented new dress

code/apparel policies in response to employees' protected, concerted activities and/or without notice to the Union and an opportunity to bargain, the General Counsel seeks an Order requiring Respondents to rescind these unlawfully implemented dress code/apparel policies and inform employees that this has been done. To the extent the Board finds that Respondents enforced their existing, facially neutral dress code/apparel policies discriminatorily to prohibit employees from engaging in protected, concerted activities, the General Counsel seeks an Order requiring Respondents to rescind these policies for the duration of the Notice posting period, and, if they decide to subsequently reinstate these policies, requiring a disclaimer that the policies will not be applied to statutorily-protected activity, as set forth in Chairman McFerran's dissent in *AT&T Mobility, LLC*, 370 NLRB No. 121 (2021).

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Consolidated Complaint. The answer must be **received by this office on or before December 3, 2021**. Respondent also must serve a copy of the answer on each of the other parties.

The answer must be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially

determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See § 102.21. If the answer is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Consolidated Complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT, at 9:00 a.m. on the **1st day of March, 2022**, in the James C. Sand Hearing Room of the Jackson Federal Building, 915 Second Avenue, 29th Floor, Seattle, Washington, or via Zoom videoconference, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing,

Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Seattle, Washington, this 19th day of November, 2021.

A handwritten signature in black ink, reading "Ronald K. Hooks", is written over a horizontal line.

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

Attachments

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing.

If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Cases 19-CA-272795 and
19-CA-272796

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in ***detail***;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

E-Service

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